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BALTIMORE  
CIVIL DIVISION

IN THE CIRCUIT COURT FOR  
~~MONTGOMERY COUNTY~~, MARYLAND  
BALTIMORE CITY

CapuNet, L.L.C., et al.,  
  
Plaintiffs,  
  
vs.  
  
America OnLine, Inc.  
22000 AOL Way  
Dulles, Virginia 20166  
  
Defendant.

Case No.: 24-C-00-000549 OC

**THIRD AMENDED AND RECAST CLASS ACTION COMPLAINT**

Come now Plaintiffs, CapuNet, L.L.C., Digizen, Inc., Millken Communications, Inc., MetroNet Internet Services, Inc., and Chesapeake Internet, on behalf of themselves and all others similarly situated, and amend their complaint against Defendant, America OnLine, Inc. ("AOL") as follows:

**JURISDICTION AND VENUE**

1. This Court has jurisdiction over this matter pursuant to Md. Cts. & Jud. Proc. § 6-103.
2. Venue is proper in this action pursuant to Md. Cts. & Jud. Proc. § 6-202(3).
3. The Plaintiff, Capunet, L.L.C., is a Maryland corporation with its principal place of business in Rockville, Maryland. Plaintiff CapuNet is an internet service provider that provides internet service to approximately 1000 corporate customers who in turn make Capunet internet service available to hundreds of others related to those companies.
4. The Plaintiff, Digizen, Inc., has its principal place of business in Arlington,

Virginia. Plaintiff Digizen is an internet service provider serving approximately 3000 customers.

5. The Plaintiff, Millken Communications, Inc., is a Maryland corporation with its principal place of business in Rockville, Maryland. Plaintiff Millken is an internet service provider serving approximately 1800 customers.

6. The Plaintiff, MetroNet Internet Services, Inc., is a Maryland corporation with its principal place of business in Baltimore, Maryland. Plaintiff MetroNet is an internet service provider.

7. The Plaintiff, Chesapeake Internet, is a Maryland corporation with its principal place of business in Baltimore, Maryland. Plaintiff Chesapeake Internet is an internet service provider.

8. The Defendant, AOL, is a Delaware corporation with its principal place of business in Dulles, Virginia. Defendant carries on business throughout the state of Maryland and the United States, providing internet access and services to the general public. Defendant has approximately 20 million customers to whom it provides these services for a monthly fee.

#### **CLASS ACTION AVERMENTS**

9. Plaintiffs bring this action individually and as the representatives of all members of a plaintiff class pursuant to Maryland Rule 2-231(b)(3). The class consists of all entities that provide internet access to customers through a computer on which Version 5.0 was installed after October 1, 1999, to the present. Included in said class is a subclass of entities that provide internet access to customers pursuant to existing, term specific contracts through a computer on which version 5.0 was installed after October 1, 1999, to the present.

10. Excluded from the class are the Defendant in this action and any of Defendant's

subsidiaries, affiliated entities, legal representatives, heirs, successors and assigns.

11. Plaintiffs aver that the class is so numerous that joinder of all members is impracticable. It is Plaintiffs' information and belief that there are more than 6,000 companies that provided internet service to customers throughout the United States.

12. Plaintiffs aver that there are common questions of law and fact common to the class as set out in the various counts of the amended complaint herein stated.

13. Questions of law and fact which are common to the Plaintiffs and members of the plaintiff class include:

a. Whether, when installed, Version 5.0 interferes with, interrupts, alters and/or disables the operation of non-AOL internet software preventing customers from utilizing non-AOL internet access providers and preventing Plaintiffs and members of the plaintiff class from providing internet access to customers as they are contractually obligated to do?

b. Whether Defendant intentionally and/or willfully designed and developed the Version 5.0 to interfere with, interrupt, alter and/or disable the operation of non-AOL internet software for the unlawful purpose of causing damage to Plaintiffs and members of the plaintiff class?

c. Whether Defendant employed unlawful means to interfere with the business relations of Plaintiffs and members of plaintiffs class?

d. Whether Defendant engaged in unfair and deceptive acts or practices in trade or commerce in violation of Maryland's Deceptive Trade Practices Act?

e. Whether Defendant fraudulently induced individual customers to install Version 5.0 on their individual computers?

f. Whether Defendant created or continued an unlawful restraint of trade?

g. Whether Defendant knew that installers of Version 5.0 had relationships with non-AOL internet access providers?

h. Whether Defendant intentionally designed, developed and distributed Version 5.0 in such a manner as to tortiously interfere with the contractual and/or business relationships between Plaintiffs and members of the plaintiff class and their customers?

i. Whether to deceive and/or induce users to install Version 5.0, Defendant misrepresented the character and quality of Version 5.0?

j. Whether to deceive and/or induce users to install Version 5.0, Defendant misrepresented to installers that Version 5.0 would not become their default browser unless the installer made an affirmative choice by clicking on the "yes" prompt?

k. Whether Plaintiffs and the plaintiff class are entitled to injunctive relief, damages, costs and attorneys' fees as a result of the tortious conduct of Defendant?

14. Plaintiffs aver that the questions of law or fact common to the members of the

class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

15. Plaintiffs' claims are typical of the claims of the members of the class. Plaintiffs and each of the class members have sustained monetary damages resulting from Defendant's actions.

16. Plaintiffs will fairly and adequately represent the interest of the class in that Plaintiffs have no conflict with other class members. Plaintiffs have retained competent counsel, experienced in complex class action litigation. Plaintiffs intend to prosecute this action vigorously. The interests of the members of the class will be fairly and adequately protected by Plaintiffs and their counsel.

#### **FACTUAL ALLEGATIONS**

17. This action is brought by the Plaintiffs, individually and on behalf of those similarly situated entities in the United States, to seek redress for harm caused by the unlawful conduct engaged in by the Defendant, AOL.

18. Defendant is the world's largest internet access market provider.

19. On or about October 1999, Defendant unveiled their new software, Version 5.0, and began a campaign to cause non-AOL internet access providers' users, the general public and existing AOL customers to install Version 5.0.

20. In reliance upon AOL's representations that Version 5.0 was superior to previous versions of AOL software, at least 8 million customers have currently installed or downloaded Version 5.0.

21. At all times, Defendant had control over the design, development, manufacturing,

marketing, labeling, testing, sale and/or distribution of Version 5.0.

22. As part of its normal and intended function, Version 5.0 interferes with, interrupts, alters and/or disables the operation of non-AOL internet software installed on individual computers, preventing customers from utilizing non-AOL internet access providers and interfering with Plaintiffs' and the class' ability to provide internet access to customers through affected computers.

23. Without warning or authorization, Version 5.0 adds or alters hundreds of files on the users computer system, including many essential operating system components and communications settings. Said additions and alterations prevent customers from utilizing non-AOL internet software and providers and, in some instances, causes the entire computer operating system to become unstable.

24. Defendant was warned by beta testers about the effects of Version 5.0 on non-AOL internet software and host computer systems.

25. Defendant chose not to alter Version 5.0 software or to warn the public that Version 5.0 would alter the host computer's communications configurations, settings and system files thereby interfering with, disrupting and/or terminating their use of other internet software and providers.

26. Despite the fact that users are asked during the installation of Version 5.0 whether they wish Version 5.0 to become their default internet browser, Version 5.0 alters the computer's communications configurations, settings and system files and interferes with, interrupts, alters and/or disables the operation of non-AOL internet software installed on the computers even if the user selects the "no" option.

27. To date, over 50 actions have been filed against Defendant by individual, consumer

installers of Version 5.0 based on its unlawful, fraudulent and/or monopolistic conduct. These consumer actions have now been transferred and consolidated for pretrial proceedings in the United States District Court for the Southern District of Miami by the Judicial Panel on Multidistrict Litigation.

28. Due to the surreptitious nature of the Version 5.0 installation, the user does not initially associate the loss of ability to access non-AOL internet services with the installation of Version 5.0.

29. Plaintiffs, have been inundated with technical support calls relating to their customers' inability to connect with the services contracted for with their companies. Plaintiff and members of the plaintiff class have been and will continue to be precluded from entering into contractual relationships with potential new subscribers who are unable to connect to a non-AOL service due to the effects of Version 5.0.

30. As a direct result of the disabling effect of Version 5.0, Plaintiffs and other class members have had to expend many hours of technical support time to explain the problem to customers, which is costly and diverts resources from other technical matters.

31. As a direct result of the disabling effect of Version 5.0, customers have expressed frustration and dissatisfaction with what appears to be problems with the Plaintiffs' systems and Plaintiffs' inability to provide the internet services they contracted to receive. The resultant loss of good will has been to the harm and detriment of Plaintiffs and other class members as customers terminate services and/or speak poorly about Plaintiffs' services to others potential customers.

#### **COUNT I: INTERFERENCE WITH BUSINESS RELATIONS**

32. Plaintiffs reallege paragraphs 1-31 of the amended complaint and incorporates same by reference in Count I as if fully set forth herein

33. Plaintiffs and members of the plaintiff class are internet access providers that provide internet service to customers pursuant to internet service contracts with those customers. Although customers purchase internet services on a monthly, at-will basis, Plaintiffs and members of the plaintiff class are contractually responsible for providing said services to their customers.

34. Defendant intentionally designed, developed and distributed Version 5.0 to interfere with, interrupt, alter and/or disable the operation of non-AOL internet software installed on individual computers, thereby preventing customers from utilizing and/or continuing their relationships with non-AOL internet access providers and interfering with Plaintiffs's and the plaintiff class's ability to provide internet access to their customers through affected computers.

35. Defendant intentionally and/or willfully designed and developed the Version 5.0 to interfere with, interrupt, alter and/or disable the operation of non-AOL internet software for the unlawful purpose of causing damage to Plaintiffs and members of the plaintiff class in their lawful business.

36. Defendant employed unlawful means to encourage the installation and use of Version 5.0 by consumers including the following:

a.(i). Defendant intentionally and/or fraudulently concealed from installers that Version 5.0 makes significant, unnecessary additions and alterations to a computer's operating system, communications configurations and settings.

(ii). Defendant intentionally and/or fraudulently concealed from installers that Version 5.0 would alter the host computer's communications configurations, settings and system files, thereby interfering with the operation of their computers and disrupting and/or terminating their use of non-AOL internet software and providers.

(iii). Defendant intentionally and/or fraudulently misrepresented to installers that Version 5.0 would not become their default browser unless the installer made an affirmative choice by clicking on the "yes" prompt and misrepresented the effect that installing Version 5.0 would have on the computer and the user of the software. Defendant had been warned about the



effects of Version 5.0 on non-AOL internet software and knew or should have known that these misrepresentations were false.

(iv). Defendants intentionally represented that Version 5.0 was of a particular standard and quality which it was not. Defendants concealed the fact that Version 5.0 was defective and would alter the host computer's communications configurations, settings and system files, thereby interfering with the operation of their computers and disrupting and/or terminating their use of non-AOL internet software and providers.

(v). Defendant made these representations and/or actively concealed this material information with the intention of deceiving customers and/or fraudulently inducing customers to install Version 5.0.

(vi). Defendant's conduct was fraudulent and/or amounted to unfair or deceptive trade practices, as prohibited by Md. Code Ann., Commercial Law, §§13-301 et seq.

b. Through Version 5.0, Defendant intentionally accessed customer computers and altered system settings, computer programs, files and code, interrupting the operation of non-AOL internet software and/or other operating system programs. Said access, alteration and damage was unauthorized and unlawful pursuant to Md. Code Ann., Art. 27, § 146.

37. Defendant further created or continued an unlawful restraint of trade. Through its unfair and deceptive practices, Defendant has, or has attempted to, monopolize the trade and/or commerce in the internet service market in violation of Md. Code Ann., Commercial Law, § 11-204. The purpose of Defendant's conduct was to exclude competition and/or to unlawfully control or affect prices.

38. Defendants unlawful conduct constitutes direct and tortious interference with the business relations of the Plaintiffs and members of the plaintiff class.

39. As a proximate result of Defendants' actions, Plaintiffs and members of the plaintiff class have been prevented from providing the internet services required by their contracts and customers have been unable to utilize and/or have terminated their internet service contracts with Plaintiffs and members of the plaintiff class.

40. As a direct result of Defendants' actions, Plaintiffs and members of the Plaintiff class suffered a substantial loss of revenue in the form of canceled contracts, underutilization of services and the costly expense of many hours of technical support hours in an attempt to repair

the problems caused by Version 5.0.

WHEREFORE, Plaintiffs, individually and on behalf of the plaintiff class, demand judgment against Defendant for compensatory and punitive damages, litigation expenses, attorneys' fees, injunctive relief, and such other further relief as the Court may deem necessary and appropriate.

#### **COUNT II: INTERFERENCE WITH CONTRACTUAL RELATIONS**

41. Plaintiffs reallege paragraphs 1-31 of the amended complaint and incorporates same by reference in Count I as if fully set forth herein

42. Plaintiffs and members of the plaintiff subclass are internet access providers that provide internet service to certain customers pursuant to existing, term-certain, internet service contracts with those customers.

43. Defendant knew that Plaintiffs and members of the plaintiff subclass had internet service contracts with individuals who would install Version 5.0. This is directly evidenced by the fact that Defendant asks installers of Version 5.0 whether they would like to use Version 5.0 as their default browser. The term "default" presupposes and recognizes the existence of agreements with other, non-AOL internet providers.

44. Defendant intentionally designed, developed and distributed Version 5.0 to interfere with, interrupt, alter and/or disable the operation of non-AOL internet software installed on individual computers, thereby preventing customers from utilizing and/or continuing their relationships with non-AOL internet access providers and interfering with Plaintiffs's and the plaintiff subclass's ability to provide internet access to their customers through affected computers.

45. Defendant intentionally and/or willfully designed and developed the Version 5.0 to interfere with, interrupt, alter and/or disable the operation of non-AOL internet software for the unlawful purpose of causing damage to Plaintiffs and members of the plaintiff subclass in their lawful business.

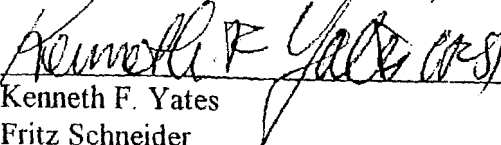
46. Defendants unlawful conduct constitutes direct and tortious interference with the business relations of the Plaintiffs and members of the plaintiff subclass.

47. As a proximate result of Defendants' actions, Plaintiffs and members of the plaintiff subclass have been prevented from providing the internet services required by their contracts and customers have been unable to utilize and/or have terminated their internet service contracts with Plaintiffs and members of the plaintiff class.

48. As a direct result of Defendants' actions, Plaintiffs and members of the plaintiff subclass suffered a substantial loss of revenue in the form of underutilization of services and the costly expense of many hours of technical support hours in an attempt to repair the problems caused by Version 5.0.

WHEREFORE, Plaintiffs, individually and on behalf of the plaintiff class, demand judgment against Defendant for compensatory and punitive damages, litigation expenses, attorneys' fees, injunctive relief, and such other further relief as the Court may deem necessary and appropriate.

RESPECTFULLY SUBMITTED,

  
Kenneth F. Yates

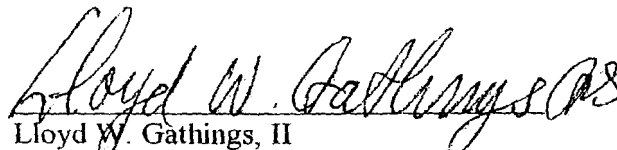
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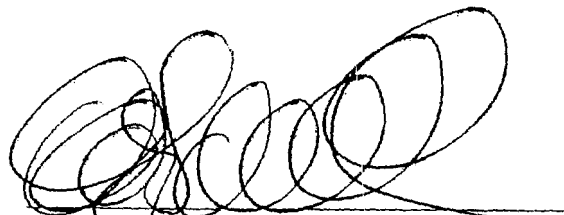
Lloyd W. Gathings, II  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was sent via United States mail to the following on this 28th day of August, 2000.

James P. Ulwick, Esquire  
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Thomas D. Yannucci, P.C.  
Eugene F. Assaf  
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Randall J. Boe  
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AMERICA ONLINE, INC.  
22000 AOL Way  
Dulles, Virginia 20166

  
OF COUNSEL



IN THE  
CIRCUIT COURT FOR  
BALTIMORE CITY

CAPUNET, L.L.C., et al.,

Plaintiffs,

v.

AMERICA ONLINE, INC.,

Defendant.

Case No. 24-C-00-000549 OC

Hon. John C. Themelis

**ORDER**

Upon consideration of Defendant America Online's Motion to Dismiss First Amended Complaint or Transfer Case, and the Court having heard and considered the arguments of counsel, as presented in the briefs and at oral argument, it is, this 17<sup>th</sup> day of July, 2000, by the Circuit Court for Baltimore City,

HEREBY ORDERED AS FOLLOWS:

1. Count I of Plaintiffs' First Amended Complaint (interference with contractual relations) is hereby dismissed. Pursuant to Maryland Rule 2-322(c), the Court grants Plaintiffs leave to amend this Count I.
2. With respect to Count II of the First Amended Complaint (interference with prospective economic relations), Plaintiffs shall file an amended complaint clarifying the "wrongful" or "unlawful" acts that Defendant is alleged to have committed, and whether the contracts between Plaintiffs and their customers that are implicated in this Count are at-will.

3. Plaintiffs shall have 30 days from the date of entry of this Order to file such an amended complaint as set forth in paragraphs 1 and 2 above.

4. In addition, the Court finds -- in view of the unique facts, circumstances and procedural history of this litigation to date -- that the interests of justice and the convenience of the parties require that this case be transferred to the Circuit Court for Montgomery County. Accordingly, pursuant to Maryland Rule 2-327(c), the Court orders that this action be, and hereby is, transferred to the Circuit Court for Montgomery County.

Dated: July 18, 2000

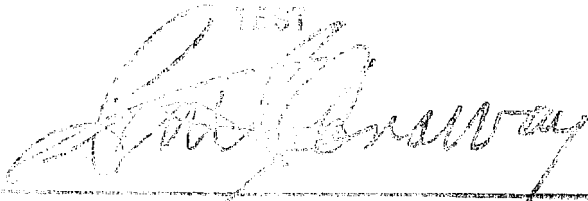
JUDGE:  
JOHN C. THEMELIS

JUDGES SIGNATURE APPEARS  
ON ORIGINAL COPY

Judge 

TRUE COPY

TEST



FRANK M. CONAWAY, CLERK





UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

**COPY**

GALAXY INTERNET SERVICES, INC.,  
On Behalf Of Itself And All Others  
Similarly Situated,

Plaintiff,

v.

AMERICA ONLINE, INC.,

Defendant.

Civil Action No: **00cv10651 GAO**

**CLASS ACTION COMPLAINT**

**JURY TRIAL DEMANDED**

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Individual and Representative Plaintiff Galaxy Internet Services, Inc., on behalf of  
itself and all others similarly situated, alleges as follows:

**I. NATURE OF THIS ACTION**

Plaintiff brings this action on behalf of itself and all other Internet Service Providers ("ISPs") who have subscribers who have downloaded or installed software developed and distributed by Defendant America Online, Inc. ("AOL"), known as Version 5.0 (Version 5.0 and any incremental versions are collectively referred to herein as "AOL 5.0"), or may in the future download or install AOL 5.0, onto their personal computers. Defendant conceived, developed and distributed AOL 5.0 pursuant to an unlawful scheme to injure and destroy its competitors in the Internet Service Market. Plaintiff and class members, who are competitors of the Defendant in the Internet Service Market, have suffered economic losses because the computer configurations of their subscribers were changed by America Online Version 5.0 in a manner which disrupted and interfered with existing and potential

subscribers' ability to access the services provided by Plaintiff and class members. Plaintiff and the Class have suffered irreparable harm to their relationships with existing subscribers and have been precluded from entering into relationships with potential subscribers, as a direct result of the problems caused by America Online Version 5.0. In addition, Plaintiff and class members have been forced to incur substantial expenses as a direct result of the installation of America Online Version 5.0 on their subscribers' personal computers, including but not limited to additional technical support costs and related expenses incurred to diagnose, analyze and resolve the problems caused by America Online Version 5.0. Plaintiff seeks relief from Defendant for attempted monopolization of the Internet Service Market, in violation of 15 U.S.C. §2, attempted elimination of competition in the Internet Service market, in violation of 15 U.S.C. §14, unfair competition, unfair and deceptive trade practices, wrongful interference with existing and prospective contractual relations, violation of 18 U.S.C. §1030, concerning fraud and related activity in connection with computers, and violation of 18 U.S.C. §2701, concerning unauthorized access or prevention of access to electronic communications.

## II. PARTIES

1. Plaintiff, Galaxy Internet Services, Inc., is corporation duly organized under the laws of the Commonwealth of Massachusetts, with its principal place of business in Newton, Massachusetts.

2. Defendant, America Online, Inc., ("AOL") is an internet service provider and a Delaware corporation. AOL's executive offices are located in Dulles, Virginia. AOL

conducts business throughout the United States, including in the Commonwealth of Massachusetts.

### III. JURISDICTION AND VENUE

3. This Court has jurisdiction over this cause pursuant to 18 U.S.C. §1030(g), 15 U.S.C. §4, 15 U.S.C. §15 and 28 U.S.C. §1331 (federal question). This Court has jurisdiction over the state law claims alleged in this Complaint pursuant to 28 U.S.C. §1367 (supplemental jurisdiction).

4. Venue is proper in this District pursuant to 28 U.S.C. §1391 because Plaintiff is incorporated and has its principal place of business in this District, Defendant's liability arose in part in this District, a substantial number of the transactions complained of in this Complaint occurred in this District, a substantial number of Class members reside or have their principal places of business in this District, and Defendant's software was advertised, distributed, promoted, installed and used in this District.

### IV. FACTUAL ALLEGATIONS APPLICABLE TO ALL COUNTS

5. The Plaintiff, the proposed Class and Defendant are all competitors in the Internet Service Market. The Internet is an association of thousands of networks of computers, comprised of millions of computers throughout the world which either use or can interact with the TCP/IP protocol. The Internet offers computer users access to data, graphics, sound, software, text, hypertext "web pages" and people through a variety of services and tools for communication and data exchange, including remote login, file

transfer, electronic mail (e-mail), news and "browsing" software.

6. Computer users who wish to access the internet generally have to subscribe to an "internet service provider" or "internet access provider" ("ISP"), which have a network of servers, routers and modems, attached to a permanent, high-speed connection to one of the larger networks in the system. ISPs typically offer dial-up access to the internet, email services and possibly other services, such as web hosting, domain name service and proprietary online services available only to subscribers. There are approximately 7,200 ISPs in the United States, ranging in size from small, local providers with a few thousand subscribers to nationwide providers with millions of subscribers.

7. ISPs charge a fee for the service of providing Internet access. Charges depend on variables such as the type of connection, modem speed and level of service. While some ISPs charge by the hour it has been increasingly popular to allow unlimited connection time for a flat monthly fee. Most ISPs charge monthly fees ranging from \$9.95 to \$50 a month.

8. Computer users may utilize the services of more than one ISP. For instance, approximately 8% of AOL's 22 million subscribers also subscribe to other ISPs. Because the quality of the Internet connection provided and the fees charged vary significantly, the ability to change ISPs at will is important to computer users.

9. AOL, which calls itself the "world's largest interactive services company," is by far the largest ISP, with over 22 million customers. For a monthly fee of \$21.95, AOL provides its customers with the ability to access the internet and to send and receive electronic mail ("e-mail"). AOL also provides customers with news, discussion groups and other exclusive "content". In addition, AOL permits subscribers to other ISPs to access its

proprietary online services for a monthly fee of \$9.95, which does not include its "dial-up" service.

10. In competing with other ISPs to continue to acquire more subscribers, AOL has engaged in a massive multi-media, direct mail, and target marketing, advertising and sales campaign, which includes offering free software for accessing its service and trial subscriptions.

11. AOL solicits consumers who already have access to the internet but are not AOL subscribers to download its software from AOL's website. Additionally, AOL arranges with computer manufacturers to have its software installed on and included with many new computer systems. Accordingly, purchasers of new computers are often solicited to become AOL customers by interactive software when they "log on" to their new computer urging them to "click" on the AOL icon to install AOL's software.

12. In October, 1999, AOL released a new version of its software -- America Online Version 5.0 ("AOL 5.0"). In connection with AOL's release of AOL 5.0, AOL launched a massive advertising blitz including press conferences, news articles and information on AOL's website calculated to induce AOL customers to switch from the software they had been utilizing to AOL 5.0. AOL represented to the consuming public that AOL 5.0 was an "upgrade" and superior to previous versions in that 5.0 provided "better, bolder e-mail! The Internet, and a whole lot more," including improved performance and functionality, ease of use, longer connections and new features such as its "You've Got Pictures" and "My Calendar."

13. In reliance upon AOL's representations that 5.0 was superior to previous

versions of the Software, at least 8 million AOL customers have currently installed or downloaded AOL 5.0.

14. These representations were false. In fact, downloading 5.0 unnecessarily "changes" the host system's communications configuration and settings so as to interfere with any non-AOL communications software and services the customer might be using or might want to use in the future, including the software and services provided by Plaintiff and members of the Class. Thus, after installing AOL 5.0, users were no longer able to connect to other ISPs, including the Plaintiff and the Class, and were no longer able to run non-AOL e-mail programs, including those offered by Plaintiff and the Class. These changes in the settings and configurations on users' computers occur regardless of whether they responded "no" when asked during the installation process for 5.0 if they wanted to make AOL their "default provider."

15. Plaintiff and the Class have received numerous complaints from their subscribers who have reported problems in accessing their services. Plaintiff and the Class have been and will continue to be precluded from entering into contractual relationships with potential new subscribers when they attempt to connect to a non-AOL service.

16. On information and belief AOL purposely designed 5.0 to change the settings and configurations on personal computers in such a way that it would become difficult, if not impossible, for existing and prospective subscribers of Plaintiff and the Class to utilize the internet access services offered by Plaintiff and the Class.

17. AOL knew or should have known that the 5.0 upgrade would and will make changes to the host system which interfere with the user's ability to connect to the networks

of competing ISPs. In fact, upon information and belief, AOL made the aforementioned misrepresentations and material omissions to users concerning the changes that installation of 5.0 would make to their computers in an effort to interfere with their ability to utilize other ISP's that compete with AOL.

18. AOL's aforementioned business practices, misrepresentations and material omissions have injured Plaintiff and the Class by interfering with their relationships with existing and prospective subscribers and by forcing their technical support personnel to spend inordinate amounts of time attempting to undo the changes made by 5.0 to their subscribers' computers. At the same time, AOL has profited through its unfair competition, by among other things, making it difficult for Plaintiff and members of the Class to compete in the marketplace.

#### V. CLASS ALLEGATIONS

19. Plaintiff brings this action as a class action on behalf of itself and all others similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. The Class is defined and described as follows:

All Internet Service Providers ("ISPs") in the United States of America who have subscribers who have downloaded or installed America Online Version 5.0, or may in the future download or install America Online Version 5.0, onto their personal computers.

20. Excluded from the Class are the Defendant in this action, any entity in which Defendant has a controlling interest, officers, directors of Defendant and the legal representatives, heirs, successors and assigns of Defendant.

21. The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiff at this time, there are approximately seven thousand ISPs in the United States. Of AOL's 22 million subscribers, approximately 8% or 1.8 million also subscribe to other ISPs. Thus, Plaintiff believes that there are at least thousands of ISPs who have been or will be damaged as a result of AOL's actions.

22. Plaintiff's claims are typical of the claims of the members of the Class as Plaintiff sustained damages arising out of AOL's attempted monopolization, unfair competition, unfair or deceptive trade practices, wrongful interference with existing or prospective contractual relations, and violations of 18 U.S.C. §1030 and 18 U.S.C. §2701.

23. Plaintiff will fairly and adequately protect the interests of the members of the Class and has retained counsel competent and experienced in class action litigation.

24. The class action device is superior to other available methods for the fair and efficient adjudication of this controversy since joinder of all members of the Class is impracticable. Furthermore, because the damages suffered by individual Class members may be relatively small, the expense of an individual action makes it impossible for the Class members to individually address the wrongs done to them. There will be no difficulty in the management of this action as a class action.

25. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among these questions of law and fact common to the Class are:

- a. Whether AOL attempted to monopolize the Internet Service Market in



violation of 15 U.S.C. §2;

b. Whether AOL attempted to eliminate competition in the Internet Service Market in violation of 15 U.S.C. §14;

c. Whether AOL violated 18 U.S.C. §1030, the Computer Fraud and Abuse Act of 1986, and whether Plaintiff and the Class were damaged by reason of such violations;

d. Whether AOL engaged in unfair competition with the Plaintiff and the Class in violation of common law and various state statutes which prohibit unfair methods of competition;

e. Whether AOL engaged in unfair or deceptive acts or practices in trade or commerce in violation of various state statutes which prohibit such conduct;

f. Whether AOL interfered with Plaintiff's and the Class' existing and prospective contractual relationships with their subscribers;

g. Whether Plaintiff and the members of the Class have sustained damages, and if so, what is the proper remedy for those damages; and

h. Whether the Plaintiff and the Class are entitled to injunctive relief.

#### COUNT I

##### **(Attempted Monopolization of Internet Service Market in Violation of 15 U.S.C. §2)**

26. Individual and Representative Plaintiff, on behalf of itself and the Class, realleges, as if fully set forth, each and every prior allegation contained herein and further

alleges, as follows, against Defendant:

27. Through its unfair and deceptive marketing practices AOL has attempted to monopolize the Internet Service Market in violation of 15 U.S.C. §2 (the Sherman Act). There is no legitimate business justification or purpose for AOL's conduct. AOL failed to use the least restrictive means for achieving its business objections.

28. On information and belief, AOL intended to achieve monopoly power in the Internet Service Market.

29. Plaintiff and the Class have been damaged as a direct and proximate result of AOL's attempted monopolization of the Internet Service Market and other predatory acts and practices as alleged above, in an amount to be determined at trial.

## COUNT II

### (Attempt to Eliminate Competition in Violation of 15 U.S.C. §14)

30. Individual and Representative Plaintiff, on behalf of itself and the Class, realleges, as if fully set forth, each and every prior allegation contained herein and further alleges, as follows, against Defendant:

31. Through the conduct alleged above, AOL has attempted to eliminate competition in the Internet Service Market. There is no legitimate business justification for the features of AOL 5.0 which cause it to interfere with subscribers' ability to access other ISPs' services, including those offered by Plaintiff and the Class. AOL failed to use the least restrictive means for achieving its business objectives.

32. AOL's distribution of its version 5.0 results in (1) modifications to the system's communications configuration and settings such as to interfere with Plaintiff's and the Class' subscribers' ability to use and access their software and services; (2) the inability of subscribers to connect to Plaintiff's or the Class' services; (3) the inability to run non-AOL e-mail programs, or connect to local networks offered by Plaintiff and the Class; and (4) the inability of subscribers who install or download AOL 5.0 to restore their computers' communications configurations, so that Plaintiff's and the Class' internet access services could be used.

33. The above conduct of Defendant resulted in and was designed to substantially lessen competition in the Internet Service Market.

34. As a direct and proximate result of the anti-competitive acts and practices alleged above, competition in the Internet Service Market was substantially lessened and was put at significant risk of being substantially lessened, and Plaintiff and the Class have been damaged in their businesses, in an amount to be determined at trial.

### COUNT III

(Violation of 18 U.S.C. §1030)

35. Individual and Representative Plaintiff, on behalf of itself and the Class, realleges, as if fully set forth, each and every prior allegation contained herein and further alleges, as follows, against Defendant:

36. The personal computers operated by the subscribers of Plaintiff and the Class are "protected computers" within the meaning of 18 U.S.C. §1030(e)(2) in that they are used

in interstate or foreign commerce or communication. Subscribers use their computers to access internet and web sites in other states or countries and to send and receive email to and from other states and countries.

37. Defendant has knowingly and with intent to defraud the Plaintiff's and Class' subscribers, accessed their personal computers without authorization, or exceeded authorized access, and obtained a thing of value, to wit, the subscribers' custom and trade, in violation of 18 U.S.C. §1030(a)(4).

38. Defendant has knowingly caused the transmission of a program, information, code, or command, and as a result of such conduct, intentionally caused damage without authorization, to the computers of Plaintiff's and the Class' subscribers, in violation of 18 U.S.C. §1030(a)(5)(A).

39. Defendant has intentionally accessed the computers of Plaintiffs' and the Class' subscribers, without authorization, and as a result of such conduct, caused damage, in violation of 18 U.S.C. §1030(a)(5)(B) and (C).

40. Such damage included the unnecessary and injurious deletion and modification of essential system files and modification of communications configurations and settings, such that the operating systems were rendered unstable and prone to systems failure impairing and/or completely blocking the ability to run Plaintiff's and the Class' software and connect to Plaintiff's and the Class' internet services.

41. Plaintiff and the Class have suffered damages and losses by reason of Defendant's violations of 18 U.S.C. §1030, as set forth above, in an amount to be determined at trial.

# **COUNT IV**

## **(Violation of 18 U.S.C. §2701)**

42. Individual and Representative Plaintiff, on behalf of itself and the Class, realleges, as if fully set forth, each and every prior allegation contained herein and further alleges, as follows, against Defendant:

43. Through the distribution of AOL 5.0 Defendant has intentionally accessed without authorization or in excess of its authorization the computer systems of Plaintiff's and the Class' subscribers and thereby prevented authorized access to their electronic communications in violation of 18 U.S.C. §2701.

44. Plaintiff and the Class are entitled to equitable relief and actual damages of no less than \$1000 for each class member, plus punitive damages, costs and reasonable attorneys fees pursuant to 18 U.S.C. §2707.

# **COUNT V**

## **(Unfair Methods of Competition and Unfair or Deceptive Business Practices in violation of M.G.L. c.93A §11 and Other Deceptive Trade Statutes)**

45. Individual and Representative Plaintiff, on behalf of itself and the Class, realleges, as if fully set forth, each and every prior allegation contained herein and further alleges, as follows, against Defendant:

46. Plaintiff, the Class and Defendant are all engaged in trade or commerce.

47. AOL's conduct, misrepresentations and omissions constitute unfair methods of competition and unfair or deceptive acts or practices in trade or commerce in violation of

Massachusetts General Laws, Chapter 93A, §2, and the similar unfair or deceptive trade practices statutes of other states.

48. Plaintiff and the Class have suffered a loss of money or property as a result of AOL's use or employment of unfair methods of competition and unfair or deceptive acts or practices in trade or commerce and are therefore entitled to treble their actual damages and reasonable attorneys fees and costs pursuant to Massachusetts General Laws, Chapter 93A, §11, and similar relief including multiple or exemplary damages under the unfair or deceptive trade practices statutes of other states.

#### COUNT VI

##### (Tortious Interference With Existing and Prospective Contractual Relationships)

49. Individual and Representative Plaintiff, on behalf of itself and the Class, realleges, as if fully set forth, each and every prior allegation contained herein and further alleges, as follows, against Defendant:

50. AOL tortiously interfered with the existing and prospective contractual relationships of Plaintiff and the Class in making it virtually impossible for their existing and prospective subscribers to access and utilize their services.

51. As a result, Plaintiff and the Class have been damaged.

### PRAYER FOR RELIEF

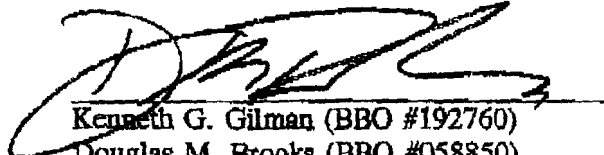
WHEREFORE, Plaintiff prays that:

1. The Court adjudge and decree that the Plaintiff is a fair and adequate representative of the Class, as defined above, and that notice of this action be given to the class in the most effective practicable manner;
2. The Court enter judgement for the Plaintiff and the Class;
3. Plaintiff and the Class recover for compensatory damages, multiple damages, exemplary damages and punitive damages, together with the costs of suit, including reasonable attorneys' fees;
4. The Defendant be perpetually enjoined and restrained from in any manner, directly or indirectly, marketing and distributing Version 5.0;
5. The Defendant be perpetually enjoined and restrained from in any manner, directly or indirectly, marketing and distributing any software which interferes with Plaintiff's and the Class's relationships with their subscribers;
6. The Court grant such other, further and different relief as the Court deems just and proper.

### JURY DEMAND

Plaintiff, on behalf of itself and all others similarly situated, hereby demands a trial by jury on all issues so triable as a matter of right.

DATED: April 3, 2000



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